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EQUITABLE CONVERSION BY CONTRACT.

If A and B enter into a contract for the sale of land, they respectively acquire rights and incur obligations in equity much more extensive than the rights and obligations of the parties at law, and certain consequences flow from the contract which are inconsistent with the rights of the parties at law. So far as these rights and obligations in equity are definitely settled by judicial decision they may be briefly enumerated as follows:

1. The vendee's heir or devisee may compel specific performance by a conveyance of the title to him¹ whereas the legal title to the contract and the right to recover legal damages thereon vest in the personal representative of the vendee. As a consequence, the personal representatives of the vendor and of the vendee will not be permitted in equity to rescind or release the contract without the consent of the vendee's heir.²

2. The vendor's heir or devisee is bound by the contract to the extent that he is bound to convey the property pursuant to the contract,³ although the vendor's personal representative is entitled to receive the purchase money.⁴

3. The vendee's widow has dower in the property in jurisdictions where there is dower in an equitable right to land.⁵

¹Ames' Cases in Equity Jurisdiction, Vol. 1, page 191, notes 1 and 2.

²Bubb's Case (1678) Freeman's Ch. Cas. 38; Ames' Cases in Equity Jurisdiction, Vol. 1, page 193, note 2; page 194, note 3.

³Lawes v. Bennett (1785) 1 Cox Eq. Cas. 167; Townley v. Bedwell (1808) 14 Ves. Jr. 591; Farrar v. Winterton (1842) 5 Beav. 1; Goold v. Teague (1859) 5 Jur. (N. S.) 116; Coles v. Feeney (1894) 52 N. J. Eq. 493; Rockland Co. v. Leary (1911) 203 N. Y. 469.

⁴Ames' Cases in Equity Jurisdiction, page 194, notes 2 and 3; see note 32 *post*.

⁵Ames' Cases in Equity Jurisdiction, Vol. 1, page 201, note 1; Bailey v. Duncan's Rep. (Ky. 1827) 4 T. B. Monr. 256.

4. The assignee of the vendor's contract or the personal representative of the vendor is entitled, as against the vendor or his heir or devisee, to compel the conveyance of the land pursuant to the contract,⁶ or to compel its sale and the application of the proceeds in payment of the purchase price.

5. The vendee can compel husbandlike conduct by the vendor pending a conveyance.⁷

6. In most jurisdictions, in equity, the burden of loss or injury to the property pending conveyance, without the fault of the vendor falls on the vendee,⁸ although at law the loss would fall on the vendor as the owner of the legal title.⁹

These differences in result in courts of law and in the courts of equity have been attributed both by text¹⁰ and by judicial writers¹¹ to the application of the so-called doctrine of "equitable conversion." This doctrine may be said to have been originated by Lord Eldon, who stated it in its modern form in *Seaton v. Slade*,¹² as follows:

⁶Assignee: *Hanna v. Wilson* (Va. 1846) 3 Grat. 243; *Ames' Cases in Equity Jurisdiction* Vol. 1, page 143, note; 207, notes 1 and 2. See also *Ibid.* page 226, note 1. Upon the same principle a judgment creditor of the vendor may charge the legal title as security for payment of the purchase money. *Ames' Cases in Equity Jurisdiction*, Vol. 1, page 213, note 1; *Zeiser v. Cohn* (1913) 207 N. Y. 407. Personal representative: *Bubb's Case* (1678) *Freeman's Ch. Cas.* 38; *Roberts v. Marchant* (1843) 1 *Phillip* 370; *Ames' Cases in Equity Jurisdiction*, page 194, note 3.

⁷*Foster v. Deacon* (1818) 3 *Madd.* 394; *Carrodus v. Sharp* (1855) 20 *Beav.* 56; *Clarke v. Ramuz* L. R. [1891] 2 *Q. B.* 456; *Ames' Cases in Equity Jurisdiction*, Vol. 1, page 225, note.

⁸*Ames' Cases in Equity Jurisdiction*, Vol. 1, page 228, note 2.

⁹*Thompson v. Gould* (Mass. 1838) 20 *Pick.* 134; *Ames' Cases in Equity Jurisdiction*, page 236, note 1; but see *Sewell v. Underhill* (1910) 197 N. Y. 168.

¹⁰1 *Sugden, Vendors* (8th Am. ed.) 187-8; 1 *Fonblanque, Equity* 413 *et seq.*; 2 *Story, Equity* (13th ed.) § 1212; 2 *Spence, Equitable Jurisdiction* 269; 2 *Kent's Comm.* (12th ed.) 476 (*e*); 1 *Pomeroy, Equity Jurisdiction*, § 105: "In short equity regards the two contracting parties as having changed positions, and the original estate of each as having been 'converted,' that of the vendee from personal into real property and that of the vendor from real into personal property." See also 1 *Pomeroy, Equity Jurisdiction* § 368; 3 *Id.* § 1261.

¹¹The cases are very numerous. The following typical examples may be referred to: *Seaton v. Slade* (1802) 7 *Ves. Jr.* 265, 273; *Lysaght v. Edwards* (1876) L. R. 2 *Ch. Div.* 499, 506; *Smith v. Loewenstein* (1893) 50 *Oh. St.* 346; *Rockland Co. v. Leary* (1911) 203 N. Y. 469.

¹²*Supra.* But see Lord Hardwicke in *Green v. Smith* (1738) 1 *Atk.* 572, Lord King in *Milner v. Milner* (1729) *Moseley* 123, Lord Thurlow in *Mayer v. Gowland* (1779) 2 *Dick.* 563.

"The effect of a contract for purchase is very different at Law and in Equity. At Law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisible by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee."

The commonly accepted view of this doctrine was stated by Jessel, M. R., in *Lysaght v. Edwards*¹³ in commenting on the legal consequences of entering into a contract specifically enforceable, as follows:

"Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity."

The continuing influence of this doctrine as a basis of judicial decision could not be better illustrated than by the opinion of the court in the recent case of *Rockland Company v. Leary*.^{13a} Judge Vann said in part in discussing this subject:

"The doctrine of equitable conversion rests on the presumed intention of the owner of the property and on the maxim that equity regards as done what ought to be done. The conversion usually becomes effective at the date of the instrument expressing the intention, if a deed or contract, and if a will, at the date of the testator's death."

The statement which is so frequently made by writers on the subject that equitable conversion by contract arises from the "presumed intention" of the parties is only another way of saying that it does not rest upon intention at all, but depends rather upon the operation of rules of law, regardless of the intent of the owner. As will sufficiently appear hereafter, a so-called equitable conversion may take place without the actual intent of the owner, and in many cases it will fail, because of defects in or defenses to the contract, the existence of which were unknown to the owner and could not therefore have affected his intent. In this respect the equitable conversion by contract differs from equitable conversion under a will which depends upon the intention of the testator as expressed in the will.

¹³(1876) L. R. 2 Ch. Div. 499, 507.

^{13a}(1911) 203 N. Y. 469, 480.

It is obvious that all occasions for the application of the doctrine of equitable conversion by contract will arise in connection with one or two classes of cases, which may be enumerated as follows:

1. Where the contract is actually being specifically performed.
2. Where there is no specific performance of the contract, but where the court is called upon to determine what person or class of persons is entitled to the real estate which is the subject of the contract, on the one side, and the purchase money, which is obligated to be paid, on the other.

In the first class of cases the court is engaged in actually compelling the conversion which by operation of the fiction of equitable conversion is supposed already to have taken place. In this class of cases, therefore, the utility of the fiction, as well as its soundness, may be tested by inquiring whether any different result would be reached by the application of accepted legal principles, without resort to the fiction of equitable conversion.

The effect of the contract of sale of land has been stated to be that the vendor becomes a trustee of the land for the vendee and the vendee becomes a trustee of the purchase money for the vendor.¹⁴ While this statement contains a germ of truth, it is obviously inaccurate, because the vendor is unlike a trustee in many particulars. He has a personal interest in the land; he is entitled to its rents, issues and profits until the date of performance;¹⁵ he holds the title as security for the payment of the purchase price;¹⁶ the proceeds of the insurance effected by him he holds for his own benefit and not the benefit of the vendee.¹⁷ The vendee, on the other hand, is a mere debtor. He holds no specific property for the vendor, and his sole obligation in law and in equity is to pay the purchase money on the conveyance of the vendor's title. More accurately stated, the obligation of the vendor in equity is to convey land to the vendee. The vendee is the owner of the correlative right in equity to have the vendor convey. Since,

¹⁴For example see *Pollexfen v. Moore* (1745) 3 Atk. 272; *Keep v. Miller* (1886) 42 N. J. Eq. 100; *House v. Jackson* (1893) 24 Ore. 89; 1 *Pomeroy, Equity Jurisdiction* § 372; 3 *Id.* § 1161; *Ames' Cases in Equity Jurisdiction*, page 241, note.

¹⁵*Townley v. Bedwell* (1808) 14 Ves. Jr. 591; *Lumsden v. Fraser* (1841) 12 Sim. *263; *Ames' Cases in Equity Jurisdiction*, Vol. 1, page 221 note.

¹⁶See note 7 *ante*.

¹⁷*Rayner v. Preston* (1881) L. R. 18 Ch. Div. 1; *Wood v. Insurance Co.* (1871) 46 N. Y. 421; *contra*, *Phinizz v. Guernsey* (1900) 111 Ga. 346; *Skinner etc. Co. v. Houghton* (1900) 92 Md. 68.

therefore, the vendee has an equitable right to the property of the vendor, he has an equitable right to restrain the vendor and those claiming under him from impairing that obligation. Thus he may restrain the conveyance of the land to third persons.¹⁸ He may compel a purchaser from a vendor with notice or a donee without notice to convey the land in performance of the contract.¹⁹ He may compel the vendor to account for unhusbandlike conduct pending conveyance and he may restrain injury to the freehold by the vendor pending conveyance.²⁰ Since the vendee has an equitable right to call for a conveyance of the land, just as in the case of the law affecting the right of a *cestui que trust* of land, his right for purposes of devolution will be treated as land. The vendee's equitable right, therefore, in equity passes to his heir or devisee²¹ and in jurisdictions where there is dower in an equitable right to land his widow is entitled to dower.²² In each of these cases equity is only disposing of the rights of the parties in accordance with its settled rule with respect to equitable rights in real estate. The right of the beneficiary of a trust of land and the equitable right of the common law mortgagor of land, are for all purposes treated as real estate without resort to any principle of equitable conversion. Upon like principle the equitable right of the vendee to call for the land in the hands of the vendor should pass to the vendee's heirs, regardless of any theory of equitable conversion.

The result, therefore, is that in the case of a contract for the sale of land, where both the vendor and the vendee are dead, the vendee's equitable right to the performance has descended to the heir, who has the right to specific performance. The obligation to convey, however, rests upon the vendor's heir, not because he is subject to obligations in contract, but because he is in the precise position of a donee of property held subject to an equitable obligation. He will not be permitted to retain the property in violation of that obligation any more than would a donee of trust property be permitted to retain it.

The right to receive the purchase money, however, has at law vested in the personal representative of the vendor, since the legal

¹⁸*Daniels v. Davison* (1809) 16 Ves. Jr. 249, *semble*; *Young v. Young* (1889) 45 N. J. Eq. 27, *semble*; *Page v. Martin* (1890) 46 N. J. Eq. 585, *semble*.

¹⁹*Ames' Cases in Equity Jurisdiction*, page 145, note 1.

²⁰See note 8 *ante*.

²¹See note 1 *ante*.

²²See note 6 *ante*.

ownership of the contract, which is personal property, passes to the personal representative and not the heir; and since the proceeds of the vendor's contract, by specific performance, is money, which is personal property, there is no equitable principle by which the personal representative of the vendor can or should be deprived of the right to receive the purchase money. The equitable right to have the legal title of the vendor now in the vendor's heir held as security for the payment of the purchase price vests in the vendor's personal representative as incidental to the personal claim on the contract which he holds.²³ The vendee's personal representative is bound to pay the contract price for the simple reason that all obligations in contract as a matter of law fall and rest upon the personal representative of the deceased debtor or obligor.

The final result, therefore, of the specific performance of the contract for the sale of land after the death of the vendor and vendee will be that the vendee's heir will be entitled to the conveyance because he is the heir of the one equitably entitled to real estate. The vendor's heir must convey because he holds property subject to his ancestor's equitable obligation to convey, and he cannot be in a better position than a donee of such property. A conveyance cannot be had without payment of the purchase price to the vendor's personal representative, who is legally entitled thereto, and who is equitably entitled to the security of the legal title. The vendee's personal representative must pay the purchase price, not only because he is the only person obligated to pay, but because payment must be made in order to finally dispose of the equitable rights of the vendee's heir and the obligation of the vendor's legal representative. All four parties are therefore nec-

²³See note 7 *ante*. The right of the vendor's personal representative to have the benefit of the legal title as security is precisely like that of the assignee of the claim secured by mortgage. The assignee is held to be entitled to the benefit of the mortgage although the mortgage is not assigned. It is commonly said that the right to the mortgage passes as an incident to the mortgage debt. More accurately stated, the mortgage title having been given as security to the mortgagee he cannot hold it free of the equitable obligation thus imposed. On the other hand the mortgagor is not entitled to a cancellation of the mortgage or a reconveyance of the mortgage title without paying the mortgage debt. To avoid both these contingencies equity imposes an obligation in the nature of a constructive trust upon the mortgagee for the benefit of the assignee of the mortgage debt. This it does despite the Statute of Frauds and even though the assignment of the debt be voluntary. *Danser v. Warwick* (1880) 33 N. J. Eq. 133. The jurisdiction is precisely like that which equity exercised when property was given by A to B for the use of C, a volunteer. Equity aided the volunteer by enforcing the use in C's favor to avoid the unjust enrichment of B.

essary parties to the action for specific performance, the vendor's heir to give title;²⁴ the vendee's heir to receive the conveyance;²⁵ the vendee's personal representative to pay the purchase price;²⁶ and the vendor's personal representative to receive it.²⁷

It is thus apparent that a result is reached commonly explained by the doctrine of equitable conversion, which nevertheless may be reached quite independently of it, and which really bears no relation to the assertion that the "sealing of the contract" renders the land the property of the vendee and the purchase money the property of the vendor. It may be suggested, however, that while the doctrine of equitable conversion serves no useful purpose in the cases under consideration, it at least does no harm and may serve in many cases as a convenient method of explaining the results actually reached. The difficulty with this view is that the test of equitable conversion, *viz.*, the "sealing of a contract" for the sale of land, as will hereafter appear, breaks down wholly in those cases where by reason of defective title, failure to comply with the statute of frauds, hardship or a reserved right to rescind the contract, a defense is interposed to an action for the specific performance of the contract. In such cases, of course, there is never a specific performance and consequently there is no "equitable conversion."

The inconsistency in which courts become involved by attempting a logical application of the doctrine of equitable conversion is exemplified in the case of option contracts. An option may be in legal effect a contract to enter into a bilateral contract for the sale of land upon the happening of a condition, that is, the exercise of the option, or it may be a unilateral contract to convey land to the option vendee upon the payment of a stipulated sum of money. As Professor Langdell has pointed out,²⁸ an option to convey on the payment of a sum of money technically does not contemplate the formation of a bilateral contract, but is a promise to convey upon the happening of a condition, *viz.*, the payment of the stipulated price which is concurrent with, and given in exchange for, the vendor's obligation to convey. Courts have, however, very generally treated such contracts as conditional offers to enter into a bilateral contract, upon the happening of a

²⁴Roberts v. Marchant (1843) 1 Phillip 370.

²⁵Townsend v. Champernowne (1821) 9 Price 130.

²⁶See note 25 *semble*.

²⁷See notes 24 and 25 *semble*.

²⁸Langdell, A Brief Survey of Equity Jurisdiction, 270.

stipulated condition evidencing the option vendee's intention to exercise the option.

In practice, option contracts are usually so drawn as to provide for the creation of a bilateral contract on the happening of the stipulated condition. Thus, the vendor agrees to sell at a stipulated price if the vendee shall give notice of his intention to exercise his option within a stipulated period, and the vendee agrees, in the event of his giving notice to purchase the land and pay the stipulated price therefor. The result is that if the vendee exercises his option there is a binding bilateral contract for the sale of land from the time when the notice is given.

Since the equitable conversion will result only from a contract for the sale of land it is obvious that the mere giving of an option will not work an equitable conversion. Since the rights of the vendor and vendee are contingent, it will follow that according to the doctrine of conversion the nature of the property, which is dependent upon those rights, will remain uncertain until the option is exercised. If the option is never exercised, then an equitable conversion will never take place. But upon the exercise of the option the obligation of the vendor becomes fixed, and according to the doctrine of equitable conversion the land is then converted into personalty in the hands of the vendor, and into realty in the hands of the vendee.

The problem, however, is not so simple if the vendor dies pending the exercise of the option. Until the exercise of the option the vendor's heir is of course entitled, both legally and equitably, to the property as land. If, however, the vendee exercises his option, he, because of the principles of specific performance in equity, becomes equitably entitled to the land and can compel a conveyance on payment of the purchase price.²⁹ The vendor's heir also must convey the property on the exercise of the option, for the same reason that the purchaser with notice, or a donee of property held subject to an option must convey upon the exercise of the option.³⁰ But what disposition shall be made of the purchase price? If the doctrine of equitable conversion is controlling, it would seem to follow that since the conversion took place only on the exercise of the option and after the vendor's

²⁹See note 32 *post*.

³⁰*Ross v. Parks* (1890) 93 Ala. 153; *Calanchini v. Branstetter* (1890) 84 Cal. 249; *Maughlin v. Perry* (1872) 35 Md. 352; *Coleman v. Applegarth* (1887) 68 Md. 21; *Page v. Martin* (1890) 46 N. J. Eq. 585; *Kerr v. Day* (1850) 14 Pa. St. 112; *Barrett v. McAllister* (1890) 33 W. Va. 738.

heir became entitled, that he, and not the personal representative, would be entitled to the proceeds of the sale as personalty.³¹ Disregarding this theory of equitable conversion, the courts have nevertheless generally reached a different conclusion, *viz.*, that the right to receive the purchase money, even in case of option contracts, passes to the personal representative and not to the heir.³² Not a little embarrassment has been experienced in the effort to harmonize this result with the theory of equitable conversion. The impossible has been attempted by resorting to the convenient fiction of relation. The conversion effected by the exercise of the option is said to relate back to the date of the option and thus entitle the personal representative to the purchase money.³³ The fallacy of such use of a legal fiction has been pointed out. Legal fictions are often relied upon by courts to prevent a failure of justice, but it is believed that no other case will be found in the books where courts have made use of a fiction for the purpose of divesting rights deemed to have been honestly acquired. If, therefore, in the case under consideration, the heir is entitled to receive the purchase money, it is a highly artificial and unjustifiable process of reasoning by which a legal fiction is invoked, for the purpose of destroying an assumed right of the heir to the purchase money. It is believed, however, that this assumption is unwarranted and that the right of the personal repre-

³¹In *Smith v. Loewenstein* (1893) 50 Oh. St. 346 the question was whether the heir or personal representative should receive the purchase money. The vendor had given an option on her land which was exercised after her death. The court held that the decision must be controlled by the doctrine of equitable conversion; that there could be no conversion until the exercise of the option; and that the heir was therefore entitled to the purchase money.

³²*Lawes v. Bennett* (1785) 1 Cox Eq. Cas. 167; *Townley v. Bedwell* (1808) 14 Ves. Jr. 591; *Collingwood v. Row* (1857) 3 Jur. (N. S.) 785; *Weeding v. Weeding* (1861) 1 John & H. 424; *Goold v. Teague* (1858) 5 Jur. (N. S.) 116; *Walrond v. Rosslyn* (1879) L. R. 11 Ch. Div. 640; *Woods v. Hyde* (1862) 31 L. J. Ch. 295; *Ex parte Hardy* (1861) 30 Beav. 205, *semble*; *In Re Isaacs* L. R. [1894] 3 Ch. 506; *Newport Water Works v. Sisson* (1893) 18 R. I. 411; *contra*, *Smith v. Loewenstein* (1893) 50 Oh. St. 346. In *Rockland Co. v. Leary* (1911) 203 N. Y. 469 the court criticized the doctrine of *Lawes v. Bennett*, *supra*, but nevertheless affirmed a judgment awarding the purchase money to the administratrix of the option vendor. In *Drant v. Vause* (1842) 1 Younge & C. Ch. 580 and *Emuss v. Smith* (1848) 2 DeG. & S. 722, the option vendor after giving the option made her will devising the land. The court held that a proper interpretation of the will would give the devisee the land if the option were not exercised and the proceeds of the land in event of the exercise of the option. See also *In re Pyle* L. R. [1895] 1 Ch. 724.

³³See discussion of the doctrine of relation in *Smith v. Loewenstein* (1893) 50 Oh. St. 346 and in *Rockland Co. v. Leary* (1911) 203 N. Y. 469.

sentative to receive the purchase money does not rest upon such an unsubstantial foundation. His right is based, not upon the artificial doctrine of equitable conversion, but upon the principles of the devolution of decedent's property.³⁴ In the case of an option contract resulting in a bilateral contract for the sale of the vendor's property, it could not be successfully denied that the right to receive the purchase money on the exercise of the option vested in the personal representative of the vendor, for the reason that the right to recover on the contract, being personal property, vests in the executor or administrator and not in the heir. But it has been suggested that in the case of an option resulting in a unilateral contract, since the vendor would have no right to an action for the purchase money, his personal representative would likewise have no action to recover the purchase money, and therefore would have no right to receive it if the purchase money were actually paid.³⁵ In arriving at this conclusion it has been assumed that the right of the executor to receive money or personal property rests upon the existence of enforceable rights vested or contingent in the executor; that therefore, in the case of a contingent bilateral contract for the sale of land, upon the happening of the contingency, after the death of the vendor, the vendor's executor would nevertheless be entitled to enforce the contract and receive the proceeds of sale, whereas in the case of the unilateral contract of sale the vendor's personal representative would not be entitled to receive the proceeds of the contract, because he had no enforceable right against the vendee. This conclusion rests upon an arbitrary distinction between the

³⁴That *Lawes v. Bennett*, *supra*, and cases following it are not to be supported by the doctrine of relation has been recognized: "If I had adopted, which I did not, the principle contended for in the argument on behalf of the heir-at-law, that the decision of *Lawes v. Bennett*, and the subsequent cases involved this proposition, that the conversion related back to the contract, then I might have thought there was something in the distinction; but, in my opinion, that is not the result of the authorities." *Chitty, J.*, in *In Re Isaacs* L. R. [1894] 3 Ch. 506, 511.

It has also been suggested that there was an inconsistency in giving to the personal representative the purchase money under an option contract although allowing the heir to receive the rents, issues and profits pending the exercise of the option, as in *Townley v. Bedwell* (1808) 14 Ves. Jr. 391. See also 24 Law Q. Rev. 408. This is doubtless logically inconsistent with the doctrine of equitable conversion but is not peculiar to option contracts. In the case of a binding bilateral contract the vendor is entitled to the rents, issues and profits pending conveyance. *Ames' Cases in Equity Jurisdiction*, Vol. 1, page 219, note. Although inconsistent with the doctrine of equitable conversion the result is sound in principle. Rent is incident to the reversion to which the vendor's heir was entitled until the date fixed for conveyance by the contract.

³⁵*Langdell, A Brief Summary of Equity Jurisdiction*, 272.

right of the executor to have vested in him an enforceable claim or chose in action, for the creation of which no obligation exists, and his right to receive or have vested in him, personal property, which is given or tendered pursuant to the terms of the contract, in order to render the vendor's promise obligatory, but for the payment or delivery of which no obligation exists. If the right to enforce the vendee's promise, performance of which must be in equity mutual and concurrent with the performance of the vendor's promise, vests in the personal representative of the vendor because it is personal property, why also should not the purchase money, payment of which in equity must be mutual and concurrent with the performance of the vendor's promise to convey, vest upon its payment in the personal representative of the vendor? If the vendee tendered the contract price and then brought an action for specific performance, equity would decree a conveyance only on payment of the purchase price to the vendor.

Further, this suggestion ignores the fact that in both cases the money paid is the proceeds and a legal incident of the contract, which so far as it is property at all, is personal property and therefore passes to the personal representative. If, for example, the vendee brought his action at law for damages for non-performance of the contract, he would be bound to bring it against the personal representative of the vendor. It could hardly be argued that in order thus to establish his legal right to a performance of the contract he should prove a tender of the purchase price to the heir, who is a stranger to the contract, instead of to the personal representative, who is the legal representative and stands in the place of the vendor. The purchase money is tendered to fix the obligation to convey. It is given in exchange for the land to the same extent as the purchase money is given in performance of a bilateral contract, yet in the latter case the tender would not be made to the heir although he would be bound to convey upon equitable principles already mentioned.

If follows, therefore, that whether an option contract be regarded as a conditional unilateral contract, or a conditional contract for the creation of a bilateral contract, the purchase money when paid is personal property, the proceeds of a contract, and as such belongs legally to the personal representatives of the vendor, unless, of course, the contract itself stipulates for the payment to the heir.

Thus it would seem that both on principle and authority the

doctrine of equitable conversion is not controlling in this class of cases when the contract is actually being performed, and tends to confuse rather than to elucidate the principles which should control the disposition of the property involved in a contract for the sale of land in the event of actual performance.³⁶

The futility of attempting to base any judicial decision on the doctrine of equitable conversion by contract, could not be better illustrated than by the course of the litigation in *Rockland Company v. Leary*, lately decided by the New York Court of Appeals.³⁷ In that case A leased his land to the plaintiff, the lease containing an option to the plaintiff to purchase the leased premises upon giving notice to A or his legal representatives and paying the purchase price within a stipulated period thereafter. Before exercise of the option A died, leaving a widow (who was appointed administratrix) and heirs, all of whom were party defendants in the action. Plaintiff gave notice to the administratrix of the exercise of his option and thereafter brought his action for specific performance. The action was twice tried. On the second trial at Special Term, the court found as conclusions of law that the option was properly exercised, that specific performance should be had by the heirs executing a conveyance to plaintiff and by plaintiff paying the purchase money to the administratrix. Each of these conclusions was duly excepted to by the defendants and judgment entered accordingly. On appeal, the Appellate Division affirmed the judgment, doubtless on the basis of its previous opinion in the case,³⁸ namely that by the exercise of the option there was a conversion of the property which it was held by relation antedated the lessor's death.³⁹ On appeal to the Court of Appeals, the Court repudiated the doctrine of conversion by relation and severely criticised the doctrine of *Laves v. Bennett*, and cases following it. It nevertheless held that the option had been properly exercised on the ground that if the phrase in the contract "legal representatives" meant the administratrix, then notice had been given to her. If

³⁶It has been suggested (Langdell, *supra*, 273) that the application of the doctrine of relation in these cases proves too much, since the option might be given for and exercised within a long period of time, with consequent inconvenience or difficulty in tendering to the personal representative. This objection is equally applicable to an option for a bilateral contract under which concededly the payment would have to be made to the legal representative.

³⁷(1911) 203 N. Y. 469.

³⁸(1909) 133 App. Div. 379.

³⁹See 203 N. Y. 469, 478.

the phrase meant heirs, then that requirement was met by a notice which had been given to one of the adult heirs. The Court accordingly affirmed the judgment which awarded the purchase money to the administratrix. Thus, after the case had received the consideration of five courts with the aid of elaborate discussions of the doctrine of equitable conversion, in the course of which different conclusions were reached by different courts, a judgment was finally affirmed which was inconsistent with any one theory of equitable conversion. The actual result, however, which is believed to be sound, must necessarily have been reached by the application of the equitable principles heretofore considered. Notice should have been given to the administratrix because it was given to fix the liability under the contract, and she was the successor to and bound by her intestate's obligation under the contract. She was entitled to proceeds of the contract as personalty. The heir was bound to convey not because he was bound by the contract but because he was in the position of a donee of property held subject to an equitable obligation.

It remains to inquire what application, if any, may be given to the doctrine of equitable conversion by contract for the sale of land when such contract is never actually performed. Since the very existence of an equitable conversion presupposes a contract which equity will specifically enforce, and since the specific performance of the contract for the sale of land always rests in the sound discretion of the court, it might be supposed that there could never be any equitable conversion apart from an actual decree directing specific performance when, of course, as has already been pointed out, the doctrine of equitable conversion becomes a perfectly useless fiction leading to no results and not even adequately explaining the results which are reached. It is believed that theoretically this is a correct statement of the controlling principle, and that the exceptions to it are more apparent than real and in any event do not rest upon the so-called doctrine of equitable conversion. It is obvious that in the case of an option contract, if the option is never exercised, there can be no equitable conversion,⁴⁰ or if the vendor and vendee voluntarily rescind the contract, there could be no equitable conversion. The same result would follow if the rescission took place after the death of the vendor and the vendee. Since, however, the vendee's heir has an equitable right to the performance of the contract, the personal

⁴⁰*Ex parte Hardy* (1861) 30 Beav. 206.

representatives of the vendor and vendee would not in equity be permitted to defeat the right of the vendee's heir without his consent.⁴¹

In the case of rescission a distinction is to be made when the right of rescission rests upon a new contract between the parties and when the right is inherent in the contract either by its terms or by reason of facts affecting or inducing its execution. Thus if the contract is free from legal or equitable defenses, the right of rescission rests only upon a new contract. Consequently the vendee's heir may claim the purchase money as a condition of his consent to a rescission, or if the rescission is made without his consent, he may claim of the vendee's executor the purchase money in liquidation of his claim for the interference with his equitable right to a specific performance.⁴² When, however, the right to rescind is inherent in the contract, either by its terms or because procured or induced by fraud, there should be no conversion if the contract is rescinded.⁴³

So also if the vendor's title proves to be defective, there could be no performance and consequently no conversion of the property,⁴⁴ unless the vendee waived the defect, in which case there might be a specific performance resulting in an equitable conversion. In the same way a contract not complying with the Statute of Frauds, will not work an equitable conversion and the parties will be left to their rights at law.⁴⁵ In each of the cases supposed, it is clear that without a specific performance there is no opportunity for the application of the doctrine of conversion, and in each case the rights of heirs and legal representatives respectively are disposed of in accordance with the rules of law.

There is, however, a limited class of cases in which there can be no specific performance in which the heir of the vendee is nevertheless held to be entitled to have the purchase money, or the personal representatives of the vendor are entitled to have the

⁴¹Bubb's Case (1678) Freeman's Ch. Cas. 38; Ames' Cases in Equity Jurisdiction, Vol. 1, page 194.

⁴²Whittaker v. Whittaker (1792) 4 Bro. Ch. Cas. 31; Matthews v. Gadd (1871) 5 So. Austr. L. R. 129.

⁴³See note 50 *post*.

⁴⁴Green v. Smith (1738) 1 Atk. 572; Broome v. Monck (1805) 10 Ves. Jr. 597; Savage v. Carroll (1810) 1 Ball & Batty 265, 281; Garnett v. Acton (1860) 28 Beav. 333; Thomas v. Howell (1886) L. R. 34 Ch. Div. 166; Lunsford v. Jarrett (Tenn. 1883) 11 Lea 192.

⁴⁵Buckmaster v. Harrop (1802) 7 Ves. Jr. 341; Rose v. Cunynghame (1805) 11 Ves. Jr. 550; Mills v. Harris (1889) 104 N. C. 626.

vendor's land in the hands of the heir sold, and the proceeds turned over to them as personalty. The reason usually attributed is that the contract of sale has worked a conversion, so that property in the hands of the vendor is personalty. The inadequacy of this explanation is apparent when account is taken of the cases in which a conversion fails because for one reason or another the contract cannot be specifically performed, and one who attempts to apply the doctrine of conversion to them logically, at once becomes involved in inconsistencies.

In all these cases, however, it will be found that a contract was entered into specifically enforceable in equity, that the contract failed of performance because of the default or laches of the vendor's heir on one hand, or the vendee's personal representatives on the other. Thus where the contract was not specifically performed because of laches, it was nevertheless held that the vendor's next of kin were entitled to have the real estate sold and distributed among them as personalty.⁴⁶ Where the vendee's personal representative was unable to carry out the contract the heir was held to be entitled to the purchase money, or so much of it as was in the hands of the personal representative.⁴⁷

Bearing in mind the legal and equitable right of the vendor's legal representatives to have the contract performed and to receive the benefit thereof, and the equitable right of the vendee's heir to have the contract performed, and to have the land contracted to be sold, it is obvious that their rights in the event that the contract cannot be specifically performed by reason of the default of the vendor's heir on the one hand, or the vendee's personal representatives on the other, do not depend on any theory of equitable conversion, but rather on simple principles of equity of practically universal application. The vendor's personal representative has both a legal and equitable right to have the contract performed by compelling the vendor's heir to convey. In equity he may file a bill to have the property in the hands of the heir treated as security and sold as upon foreclosure.⁴⁸ This right, if lost in the case under consideration, is lost by the laches or default of the

⁴⁶*Curre v. Bowyer* (1818) 5 Beav. 6 note (b); *Keep v. Miller* (1886) 42 N. J. Eq. 100; *Bennett v. Tankerville* (1812) 19 Ves. Jr. 170; *Leiper's Appeal* (1860) 35 Pa. St. 420. If the vendor's heirs are infants and cannot therefore give good title, they will nevertheless not be permitted to profit by their inability to perform their equitable obligation. *Tebbutt v. Voules* (1833) 6 Sim. 40; *Bullock v. Bullock* (1820) 1 J. & W. 583.

⁴⁷*Whittaker v. Whittaker* (1792) 1 Bro. Ch. Cas. 31.

⁴⁸See notes 6, 23 and 42 *ante*.

heir. Thus while the vendee may resist specific performance because of the laches or default of the vendor's heir, this is a personal defense available to him alone. To permit the vendor's heir to defeat the right of the personal representative by his laches, would enable him to enrich himself at the expense of the personal representative, by reason of his own failure to perform an equitable obligation. Equity never permits a defendant to enrich himself at the plaintiff's expense by depriving plaintiff of equitable rights through his, the defendant's own laches or misconduct. The vendee's personal representative cannot enrich himself at the expense of the vendee's heir as a reward for his default, and it is for this reason that the heir may in that case compel payment to him of the purchase price.⁴⁹

It may be suggested that a distinction should be drawn between the case where the contract failed of specific performance, because of the default of a party, and the case where the specific performance failed because the vendor had reserved a right to rescind on the happening of an event. In the latter case the vendor contemplated the possibility that the contract might not be performed and specifically reserved the right to terminate it. The vendee's heir cannot complain of the exercise of this right since it involves no breach of any legal or equitable obligation of contract on the part of the vendee's personal representatives and consequently the vendee's heir should have no claim on the purchase money, although he would have such a claim if performance failed because of the default of the vendee's legal representative.⁵⁰

⁴⁹It is upon this principle that equity protects the right of the vendee's heir even though the contract be rescinded by the vendor and the legal representative of the vendee who are the legal owners of it. Note 42 *ante*. In precisely the same way equity protects the right of a common law assignee of a chose in action. The assignor could destroy all rights at law of the assignee by revoking the power of attorney which was created by the assignment, or by collecting the claim, or by releasing it. Equity would nevertheless compel the assignor to make reparation by paying the value of the claim or the proceeds of it to the assignee. *Fortescue v. Barnett* (1834) 3 M. & K. 36. Or when the debtor had notice of the assignment and paid the creditor he might be compelled to pay the claim to the assignee by way of reparation for interference with his equitable right although the claim was extinguished by the payment to the assignor. *Jones v. Farrell* (1857) 1 DeG. & J. 208; *Roberts v. Lloyd* (1840) 2 Beav. 378. In the same way a transferee of property subject to a mortgage, whose duty it is to pay taxes, may not set up a tax title against the mortgagor or the mortgagee. *Bank v. Bacharach* (1879) 46 Conn. 513; *Fair v. Brown* (1875) 40 Ia. 209; *Kezer v. Clifford* (1879) 59 N. H. 208; *Ryan v. Martin* (1889) 104 N. C. 176.

⁵⁰*Lombard v. Chicago etc. Congregation* (1872) 64 Ill. 477; *s. c.* (1874) 75 Ill. 271. But Lord Romilly, *M. R.*, took the opposite view in *Hudson v. Cook* (1872) L. R. 13 Eq. Cas. 417, when he

It is thus apparent that the cases hitherto considered not only do not rest upon any doctrine of equitable conversion, but that it is not a safe or intelligible guide to the results actually reached by the decisions.

There still remains for consideration the case where, pending performance of the contract for the sale of land, a substantial part of the subject matter of the contract, for example, buildings or improvements, are destroyed without the fault of the vendor. By the weight of authority the "burden of loss" is held to fall on the vendee.⁵¹ Various theories have been advanced as adequately explaining a result which doubtless in many cases is the reverse of the intention of the parties, and in all is contrary to the results reached by courts of law. The explanations which do not frankly rest on fiction are based upon the fundamental notion that since in equity the vendee is for some purposes, dealt with as an owner of the realty he should be so dealt with for all purposes, and that consequently the loss should fall on him, just as the burden of loss of trust property must fall on *cestui que trust*, that is to say, in equity the vendee's right is treated as an interest in land.⁵²

So much has been written on this subject that it is perhaps almost an impertinence to add to the mass of literature dealing with it.⁵³ It is believed, however, that in the explanation and justification of this doctrine certain principles have been overlooked, which should have had a controlling influence in settling the question.

To recur to the preceding discussion, we have seen that in every case where we have found a case of so-called equitable conversion, it is either a case where the contract is being actually performed by a court of equity, or the failure to perform it is due to the default of a party to the contract, who would thereby enrich himself at the expense of the person equitably entitled to the land

held that despite a rescission of the contract pursuant to a right reserved in the contract itself, the heir of the vendor was entitled to have the vendor's administrator pay over to him the purchase money. It is difficult to reconcile this conclusion with the case of a rescission because of a defect of title in which no "conversion" takes place. See note 44 *ante*. See also remarks of the same learned judge in *Cooper v. Jarman* (1866) L. R. 3 Eq. Cas. 98, 101.

⁵¹Ames' Cases in Equity Jurisdiction, Vol. 1, page 228, note 2; page 236, note 1.

⁵²"It follows, therefore, (from the doctrine of equitable conversion) that the purchaser being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership." 4 Pomeroy, Equity Jurisdiction § 1406.

⁵³See especially 1 COLUMBIA LAW REVIEW 1; 9 Harvard Law Review 106.

on the one side, or its proceeds on the other, unless in equity he were deprived of the land or the proceeds by reason of his default. It is evident that in the first case, any fact which prevents a specific performance prevents the equitable conversion, and the parties are left wholly to their rights and obligations at law. This principle is subject to the exception of the second case, that one equitably obligated to perform the contract, may not enrich himself by his failure to perform it. It is thus apparent that the theory of equitable ownership of land, subject to a contract of sale, is literally an incident of the right of specific performance, and cannot exist apart from it.⁵⁴ A preliminary to the determination of the question whether there is equitable ownership of land must therefore necessarily be the determination of the question whether there is a contract which can be and ought to be specifically performed at the very time when the court is called upon to perform it. This process of reasoning is, however, reversed in those jurisdictions where the "burden of loss" is cast upon the vendee. The question is whether there shall be a specific performance of the contract, thus casting the burden on the vendee, by compelling him to pay the full purchase price for the subject matter of the contract, a substantial part of which has been destroyed. The question is answered somewhat in this wise: equitable ownership of the vendee in the subject matter of the contract can exist only where the contract is one which equity will specifically perform. The vendee of land is equitably entitled to land, therefore the vendee may be compelled to perform, although the vendor is unable to give in return the performance stipulated for by his contract. The *non sequitur* involved in the proposition that performance may be had because of the equitable ownership of the land by the vendee, which in turn depends upon the right of performance, is evident. The doctrine of equitable conversion, so far as it is exemplified by the authorities hitherto considered, cannot lead to the result of casting the burden of loss on the vendee, since the conversion depends upon the question whether the contract should in equity be performed. In all other cases where the vendee is treated as the equitable owner of the land,

⁵⁴"The only reason why a contract by the owner of land for the sale of it to another operates to effect conversion is, that a court of Equity will compel him specifically to perform his contract. Conversion as arising from a contract to sell is merely and exclusively the consequence of the application by a court of Equity of the doctrine of specific performance. When there can be no specific performance there can be no conversion." Kindersley, V. C., in *Haynes v. Haynes* (1861) 1 Dr. and Sm. 426, 452.

it is only because the contract is one which equity first determines should be specifically performed.

Whether a plaintiff, in breach of his contract by a default which goes to the essence, as in the case of the destruction of a substantial part of the subject matter of the contract, should be entitled to specific performance, is a question which is answered in the negative in every case except that of destruction of the subject matter of the contract. To give a plaintiff specific performance of the contract when he is unable to perform the contract on his own part, violates the fundamental rule of equity that the remedies must be mutual, and that equity will not compel a defendant to perform when it is unable to so frame its decree as to compel the plaintiff to give in return substantially what he has undertaken to give or to do for the defendant.

The rule of casting the "burden of loss" on the vendee by specific performance if justifiable at all can only be explained and justified upon one of two theories: first, that since equity has for most purposes treated the vendee as the equitable owner, it should do so for all purposes, although this ignores the fact that in all other cases the vendee is so treated only because the contract is either being performed or in equity ought to be performed; or, second, which is substantially the same proposition in a different form, the specific performance which casts the burden on the vendee is an incident to and a consequence of an equitable conversion, whereas in all other equity relations growing out of the contract, the equitable conversion, if it exists, is an incident to and consequence of, a specific performance. Certainly nothing could be more illogical than this process of reasoning. The inconvenience of the doctrine is sufficiently attested by the now almost universal practice of stipulating in the contract of sale that the loss, if any, pending conveyance, shall fall on the vendor.

It has been said that the decisions in the cases relating to equitable conversion cannot be reconciled with any consistent principle, and "the result is that the student is faced with the necessity of committing to memory a long series of complicated rules which are merely arbitrary."⁵⁵ A survey of the whole subject in the case of equitable conversion by contract, however, hardly justifies this statement. The decisions are harmonious when considered in the light of fundamental equitable principles, except upon the question of "burden of loss," on which point the authorities are divided.

⁵⁵24 Law Q. Rev. 411.

Inconsistencies arise only when one attempts a too literal application of the fiction of equitable conversion, as it was stated by Lord Eldon as a substitute for equitable principles which the fiction always imperfectly and usually inaccurately represents. Most of the difficulties and perplexities which attend the disposition of rights arising under contracts from the sale of land would never have arisen had this fiction never been invented. The student, therefore, should not attempt to memorize a long series of complicated rules relating to a useless fiction, which are merely arbitrary, but he should seek to ascertain the nature of the rights created by a contract specifically enforceable in equity, and the principles which govern the disposition of those rights when once called into existence.

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